

**UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF THE INTERIOR**

<b>Open and Nondiscriminatory</b>	<b>§</b>	<b>Minerals Management Service</b>
<b>Movement of Oil and Gas as Required</b>	<b>§</b>	<b>30 C.F.R. Part 291</b>
<b>the Outer Continental Shelf Lands Act</b>	<b>§</b>	

**COMMENTS OF DCP MIDSTREAM, LP TO  
NOTICE OF PROPOSED RULEMAKING**

DCP Midstream, LP (“DCP”)<sup>1</sup> submits the following comments in response to the notice of proposed rulemaking (“NPRM”) issued by the Minerals Management Service (“MMS”) on April 5, 2007.<sup>2</sup> DCP generally supports the proposed rule. However, three aspects of the proposed rule warrant comment, as described fully below.

**I.  
Background**

MMS issued an Advance Notice of Proposed Rulemaking (“ANPRM”) in 2004 to determine whether a need exists for regulations to assure open and nondiscriminatory access to pipelines that transport oil or gas produced from submerged lands or Outer Continental Shelf (“OCS”) lands.<sup>3</sup> Subsequently, MMS held public meetings to hear oral comments and received written comments from 17 respondents. Duke Energy Field Services, LP<sup>4</sup> submitted comments on MMS’ Advance Notice of Proposed Rulemaking concerning this issue on June 9, 2004 (“2004 Comments”). The 2004 Comments recommended light handed regulation that is guided by competition and is complaint driven. The 2004 Comments also advocated that any regulations be applied to OCS pipelines uniformly and recommended that the MMS forego

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<sup>1</sup> DCP Midstream, LP is a midstream energy company that gathers, processes, transports, markets and stores natural gas and produces, transports, and markets natural gas liquids. DCP owns Dauphin Island Gathering Partners and a forty percent interest in Discovery Producer Services, both of which own offshore natural gas gathering and transmission facilities in the Gulf of Mexico.

<sup>2</sup> Open and Nondiscriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act, Proposed Rule, 72 Fed. Reg. 17047 (April 6, 2007).

<sup>3</sup> 69 Fed. Reg. 19137 (April 12, 2004).

<sup>4</sup> On January 1, 2007, DCP changed its name from Duke Energy Field Services, LP.

erecting an official MMS complaint procedure since the federal district court remains an available forum for Outer Continental Shelf Lands Act (“OCSLA”)<sup>5</sup> complaints. All but one of the issues raised in the 2004 Comments are included in this NPRM.

After consideration of the comments, MMS has proposed to include a new part 291 in its regulations, which would implement complaint procedures and informal alternative dispute processes to address allegations that a shipper has been denied open and nondiscriminatory access to a pipeline contrary to sections 5(e) and (f) of the OCSLA.

Pursuant to Section 27 of the OCSLA<sup>6</sup> and Section 342 of the Energy Policy Act of 2005, the United States is entitled to take its royalty in-kind, rather than receiving proceeds from the sale of the product. In implementing this authority, MMS has established a Royalty-in-Kind (“RIK”) process, which includes negotiating rates for transporting production to market. As MMS acknowledges in the NPRM, some of that transportation will likely occur on pipelines subject to this rulemaking.

## **II.**

### **Comments**

#### **A. DCP Supports The Informal Resolution Alternatives.**

DCP supports the MMS inclusion of a hotline for informal resolution of allegations of open and nondiscriminatory access. The use of hotlines for resolutions of allegations is an important, low cost alternative to filing a formal complaint. In addition to the hotline process, the option for a shipper to request the use of Alternative Dispute Resolution before the filing of a formal complaint is also a valuable tool in resolving issues between shippers and OCSLA pipelines. Shippers and pipelines in the OCS are best served by avoiding the costly and time

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<sup>5</sup> 43 U.S.C. §§ 1334(e) and (f).

<sup>6</sup> 43 U.S.C. § 1353.

consuming formal complaint process and the two informal alternatives included in the NPRM encourage the filing of a formal complaint as a last resort.

**B. Formal Complaints Before MMS Create An Inherent Conflict Of Interest As A Result Of The RIK Process And Should Be Handled In District Court.**

DCP urges the MMS to reconsider the establishment of an administrative forum for formal complaints. The OCSLA already provides a forum for complaints to be brought in federal court, and the existing complaint-based enforcement regime has worked well. In addition, there is no discussion in the preamble of the NPRM or evidence in the rulemaking record of a need for MMS to make itself available as an additional forum for resolving OCS complaints. Thus, the most appropriate course of action would be for the MMS to allow the courts to continue as the forum for formal complaint resolution when the informal alternatives proposed in the NPRM have been exhausted.

Moreover, DCP submits that, unlike the federal courts, MMS, as a shipper of royalty-in-kind production on OCSLA pipelines subject to the proposed rule, has an inherent conflict of interest that prevents it from objectively deciding open access complaints since the MMS will have the same incentives as the shippers submitting the complaints. Any decision by the MMS regarding open and nondiscriminatory access is at risk for being overturned on appeal because of the potential conflict of interest unlike decisions made by a federal district court.

In the NPRM, MMS defends the proposed complaint process by comparing it to cases in which the MMS Director decides lessees' appeals of MMS orders issued by Minerals Revenue Management ("MRM") to pay additional royalties. In those cases, the appeals are decided by a different MMS program, Policy and Management Improvement ("PMI"), to which the Director has delegated his or her authority. MMS asserts that because PMI would also decide complaints

on open access, there would be no conflict of interest. However, the two situations are not comparable.

In the case of royalties assessed on oil and gas production from lands owned by the federal government, MMS is the federal agency charged with collecting and distributing such money. Congress directed that the Secretary of the Interior establish an administrative appeals process for determining royalty disputes between the Secretary's designee, MMS and the lessee. By contrast, Congress has not mandated that an administrative process be established for deciding OCS open access complaints. In the case of RIK, MMS is a pipeline shipper no different in status from non-government shippers. Because it has the exact same interest as non-government shippers, all decisions of the MMS would be subject to potential conflicts of interest and not just complaints involving the MMS as a shipper. Given the absence of Congressional action creating a forum to resolve this inherent conflict, the MMS should allow the courts to continue as the forum for formal complaint resolution.

**C. MMS Should Institute A Deadline So That Formal Complaints Are Filed In A Timely Manner.**

If MMS decides to proceed with establishing an administrative complaint process, MMS should add to its proposed procedures a deadline for initiating the complaint process, including a request for use of the proposed alternative dispute resolution, an informal complaint to the MMS Hotline, or a formal complaint. It is necessary for OCSLA pipelines that will be subject to this rule to have certainty with regard to when a complaint can be filed. Leaving the time frame open ended creates unnecessary uncertainty that will only complicate the process.

The proposed regulations contain a deadline for answering a complaint, but they do not establish a deadline for filing the complaint or for seeking informal resolution. In the NPRM, MMS recognizes that information necessary to answer a complaint may become stale or even

non-existent. MMS further queries whether the “mere” passage of time should be a limiting factor on whether a shipper can submit a complaint. DCP submits that in the interest of fairness and administrative efficiency, shippers should be required to seek prompt resolution of their disputes. DCP suggests that a reasonable deadline is within 90 days of when the alleged denial of open and nondiscriminatory access occurred.

The recommended deadline of 90 days is a reasonable amount of time for a shipper to determine whether they have been denied open and nondiscriminatory access to an OCSLA pipeline. Without a deadline, a shipper could use the complaint process as leverage against an OCSLA pipeline. The implementation of a set deadline places the burden on the shipper to determine if there was a problem in a timely manner which benefits the OCSLA pipelines and MMS.

**D. Clarification Of The Civil Penalty Process Is Necessary.**

One of the actions the MMS may take under the NPRM to remedy the denial of open or nondiscriminatory access is the assessment of a civil penalty. The civil penalty will begin to accrue 60 days after the order to provide open and nondiscriminatory access is received by transporter. This timing does not adequately address the situations where construction is required to provide open and nondiscriminatory access or the shipper’s gas is not otherwise available to flow. The MMS should revise its regulations to begin to accrue penalties 60 days after the order to provide open and nondiscriminatory access is received by transporter “or 10 days after the facilities necessary for Shipper to deliver gas are in service, whichever is later, provided the transporter exercises reasonable diligence in the construction of any necessary facilities.”

Without this clarification, OCSLA pipelines would be subject to civil penalties when they are unable to comply with the order due to circumstances beyond their control. Since all activity on the OCS is major construction involving long lead times, it is imperative that appropriate time be given to address the guidance of the order before civil penalties are accrued.

### **III.** **Conclusion**

For the reasons stated above, DCP urges the MMS to continue the practice of having complaints brought in federal district court instead of before the MMS. In addition, if the MMS retains the formal complaint process, the regulations should require Shipper to file complaints within 90 days of the alleged denial of open and nondiscriminatory access and civil penalties should not be accruing until the later of 60 days after an order is received and 10 days of required facilities being placed in service.

Respectfully submitted,



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